



BRB No. 15-0115

DAMIR HOZIC)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
FLUOR DANIEL CORPORATION)	DATE ISSUED: <u>Sept. 28, 2015</u>
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Partial Award of Attorney Fees and the Supplemental Decision and Order – Denial of Reconsideration Request & Partial Approval of Additional Attorney Fee of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett, Lerner, Karsen & Frankel), Ft. Lauderdale, Florida, for claimant.

John F. Karpousis and William H. Yost (Freehill, Hogan & Mahar), New York, New York, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Partial Award of Attorney Fees and the Supplemental Decision and Order – Denial of Reconsideration Request & Partial Approval of Additional Attorney Fee (2013-LDA-00563) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33

U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

On August 18, 2011, claimant was injured in a bomb explosion during the course of his employment for employer in Afghanistan. He missed a few days of work, and then left for three weeks of leave at his home in Bosnia. Claimant returned to his usual work for employer on September 18, 2011, and continued to work for employer until March 31, 2013, when he was terminated for allegedly physically assaulting his supervisor. Claimant filed a claim on April 17, 2013, for shoulder and back injuries and for sleeping difficulties, which he later amended to include treatment and compensation for a psychological condition, allegedly caused by the August 18, 2011 incident. *See* Emp. Obj. to Fee Pet. at Exs. A, E.

After the case was referred to the Office of the Administrative Law Judges, the parties settled the claim pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). The settlement provided that employer would pay claimant \$50,000, representing \$40,000 for permanent partial disability and \$10,000 for future medical care. The parties could not agree as to the amount of an attorney's fee, but employer agreed to pay "the quantum of claimant's attorney's fees once that amount is determined" by the administrative law judge. The administrative law judge approved the settlement agreement in a decision issued on December 6, 2013; he found the settlement petition complied with the regulations, and that the settlement amount was adequate and not procured by duress. 33 U.S.C. §908(i); 20 C.F.R. §§702.242-243.

Claimant's counsel submitted a fee petition to the administrative law judge requesting a fee of \$32,980, representing 68 hours of attorney time at an hourly rate of \$485, plus costs of \$81.87. Employer filed objections to the fee petition, contending that the fee requested was out of proportion to the degree of success obtained and the complexity of the issues.

In his Supplemental Decision, the administrative law judge reduced the hourly rate to \$465, but found the number of hours requested by counsel to be reasonable and necessary. Supp. Decision and Order at 4. The administrative law judge then addressed the degree of the overall relief counsel obtained for claimant and found that, although the settlement was favorable to claimant, it understated the value of a fully successful, litigated claim. Supp. Decision and Order at 5. The administrative law judge, therefore,

further reduced the fee request by 20 percent, and he approved a fee of \$25,296,¹ plus the requested expenses of \$81.87, to be paid by employer. *Id.* at 6. In a second supplemental decision, the administrative law judge addressed, as a motion for reconsideration, claimant's counsel's reply to employer's objections, which he had not considered prior to the issuance of his fee award. The administrative law judge found that, pursuant to the settlement, he had the authority to reduce the requested attorney fee and that the reduced fee award of \$25,296 is appropriate. Supp. Decision on Recon. at 4. The administrative law judge approved an additional fee of \$1,041.60 for claimant's counsel's work on his reply brief.²

Claimant appeals the fee award. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant first contends that employer agreed in the settlement to pay all of counsel's fee; therefore, once the administrative law judge determined the hourly rate and number of compensable hours, the administrative law judge erred by further reducing employer's liability by 20 percent since, by so doing, he impermissibly shifted liability to claimant for the 20 percent of the reasonable fee for which the administrative law judge found that employer is not liable (\$6,324).

Generally, an attorney is entitled to a fee for his services when his client obtains benefits. 33 U.S.C. §928. If the circumstances of the case do not permit the shifting of fee liability to the employer under Section 28(a) or (b), 33 U.S.C. §928(a), (b), the claimant may be required to pay for his attorney's services as a lien on his compensation. 33 U.S.C. §928(c);³ *see, e.g., Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'd on recon.* 41 BRBS 1 (2007) (Hall, J., dissenting on other grounds), *aff'd*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). However, the parties may agree to an attorney's fee as part of a Section 8(i) settlement. *Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014); 20 C.F.R. §§702.132(c), 702.241(e). In this case, the settlement provided, "the employer/carrier agrees to satisfy the quantum of claimant's attorney's fees once that amount is determined by the appropriate court." Settlement Agreement at 6. Pursuant to this provision, the administrative law judge was to determine the amount of the attorney's

¹ 68 hours x \$465 x .80 = \$25,296.

² \$465 x 2.8 x .80 = \$1,041.60.

³ Section 28(c) states: "An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment." *See also* 20 C.F.R. §702.132(a).

fee for which employer is liable; counsel is not automatically entitled to the amount claimed. Thus, contrary to claimant's contention, the terms of the settlement do not preclude the administrative law judge from awarding counsel a reduced fee. Moreover, as the parties agreed that employer is liable for "the quantum" of the approved fee, counsel cannot assert a right to also collect from claimant any portion of his fee denied by the administrative law judge. Thus, counsel is prohibited by the plain language of the settlement from attempting to collect any portion of his fee from claimant.

Claimant next contends that the administrative law judge had no basis by which to reduce the fee request by 20 percent. Claimant asserts that the administrative law judge, having approved the settlement as adequate cannot, after the fact, speculate as to claimant's success on the merits had the case been adjudicated. Claimant notes that employer did not pay claimant any disability or medical benefits and that employer cannot be permitted to suggest to the administrative law judge in response to the fee petition that claimant's case was worth more than the amount for which the parties settled. Counsel avers that most settled cases "could have been" worth more if the claimant fully succeeded on the merits.

The administrative law judge stated that employer's valuation of the claim, in its objections to the fee petition, is "significantly overstated." Supp. Decision and Order at 5. The administrative law judge observed that claimant claimed one month of temporary total disability benefits, ongoing permanent partial disability compensation from April 2013 for a psychiatric injury and disabling shoulder pain, which was supported by a medical evaluation, and medical benefits. *Id.* The administrative law judge thus found that the \$40,000 settlement for disability compensation was "an understatement of the value of (the) claim considering the violent circumstances of [claimant's] injuries, and the recent medical diagnosis of permanent shoulder damage, permanent headaches and post traumatic stress syndrome." *Id.* The administrative law judge noted that the settlement was nonetheless favorable to claimant given the testimonial conflicts identified during discovery.⁴ *Id.* at 2. The administrative law judge concluded that, "balancing the valuation uncertainties in this case . . . a 20% reduction of the lodestar amount . . . is warranted." *Id.* at 5.⁵

⁴ Counsel states that claimant averred he stopped working due to psychological problems, but employer submitted evidence that claimant's employment was terminated due to a physical altercation with his supervisor, which undermined claimant's credibility as to his ongoing symptoms. Cl. Brief at 4; *see* Emp. Obj. to Fee at Ex. F p. 27.

⁵ In denying claimant's motion for reconsideration, the administrative law judge summarily reiterated this conclusion. Supp. Decision on Recon. at 4.

An administrative law judge is permitted to award a reduced fee when the relief obtained is limited in comparison to the scope of the litigation as a whole. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). In *Hensley*, the Supreme Court stated that the fee award should be for an amount that is reasonable in relation to the results obtained, as the degree of success is the most critical factor. *Id.* at 435-437, 440. The courts have recognized the broad discretion of the factfinder in assessing the amount of an attorney's fee pursuant to *Hensley* principles. *See, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001).

Nonetheless, we agree with claimant that the administrative law judge abused his discretion in awarding a reduced fee on the basis that claimant was only partially successful because the settlement agreement understated the value of claimant's claim. *Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348 (11th Cir. 2008). In approving the Section 8(i) settlement, the administrative law judge found that the settlement was "adequate," which is a requirement of the statute. 33 U.S.C. §908(i); *Richardson v. Huntington Ingalls, Inc.*, 48 BRBS 23 (2014). The administrative law judge, having approved the settlement as adequate, cannot, in determining a reasonable fee, agree with employer that the claim was only partially successful. In this regard, the administrative law judge's analysis failed to consider that employer had not paid claimant any benefits voluntarily and had contested the entire claim. On the facts of this case, therefore, claimant was successful. *See Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89 (1993) (Brown, J., dissenting) (success is measured against the amount of benefits voluntarily paid by employer); *see also Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). Moreover, the parties' decision to settle the claim by compromising their positions was done in order to avoid the risks associated with litigation. Under these circumstances, it is not appropriate to compare the amount of claimant's settlement recovery with the amount of a fully successful, fully litigated claim. However, although the lodestar calculation provides a presumptively reasonable fee,⁶ the administrative law judge is entitled to evaluate the fee requested in terms of the factors expressed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which include the amount of benefits obtained. *See Bivins*, 548 F.3d at 1350; *see also Blanchard v. Bergeron*, 489 U.S. 87 (1989). Accordingly, we vacate the administrative law judge's fee award, and we remand for the administrative law judge to determine the amount of an attorney's fee that is reasonable in relation to the amount of claimant's settlement recovery, rather than on the basis that claimant was only partially successful. *See generally Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003).

⁶ As mentioned, the administrative law judge found all the entries in counsel's fee petition to be "reasonable and necessary" and that an appropriate hourly rate for counsel's services is \$465. Supp. Decision and Order at 4.

Accordingly, the administrative law judge's Supplemental Decision and Order Partial Award of Attorney Fees and the Supplemental Decision and Order – Denial of Reconsideration Request & Partial Approval of Additional Attorney Fee are vacated and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge